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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MIDDLESEX COUNTY UTILITIES AUTHORITY
(formerly Middlesex County Sewerage Authority),

Petitioner,

v.

CITY OF NEW BRUNSWICK, BOROUGH OF MILLTOWN and THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review

1. Whether the user charge system prerequisite for federal sewer construction grants to public sewerage agencies under the Federal Water Pollution Control Act of 1972 (FWPCA), 33 *U.S.C.* §1284(b)(1)(4), properly construed, justifies a curtailment by the United States Environmental Protection Agency (EPA) of grant funds otherwise approved, to a regional public sewerage agency, notwithstanding the grantee secures adoption of a proper user charge system for all its 25 municipal participants, solely because a very small non-participating municipality has no user charge system for the reason that it has a long-standing binding contract with a participating municipality for the treatment of its sewage free of charge as a result of which the sewage of both municipalities is treated by the grantee at the expense only of the participating municipality.

2. Whether, in the circumstances recited in Question 1, it makes any difference that the grantee agency has joined in and supports state court litigation brought by the participating municipality to have the said contract set aside and the other municipality ordered to pay for its sewage treatment and to adopt a user charge ordinance.

3. Whether the purpose and intent of 33 *U.S.C.* §1284 (b)(1)(4), in requiring as a condition of a federal construction grant the adoption by the grant "applicant" of a system of user charges, is not qualified by the inability, legal or otherwise, of the applicant to effect such a system to the extent of 100 per cent, and whether the statute is not satisfied by substantial performance of such a condition within all the applicant's participant municipalities notwithstanding failure to effect it in a very small non-participating but sewage-contributing municipal-

ity because of absence of legal power of the applicant or its municipal participants to do so.

4. Whether, in the circumstances set forth in Questions 1, 2 and 3 a regulation adopted by EPA having the effect of denial of disbursement of 20 per cent of the approved grant money to the grantee is invalid because contrary to the underlying purpose and intent of the FWPCA to eliminate water pollution by means inclusive of massive federal grants to public sewerage agencies to enable construction of efficient waste treatment plants and upgrade existing ones.

5. Whether, assuming that EPA has general discretion to withhold grant funds for absence of a user charge system in any municipality whose wastes enter the grantee system, it is an abuse of agency discretion and arbitrary, capricious and unreasonable to withhold grant funds to the applicant in the circumstances set forth in Questions 1, 2 and 3.

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Opinions Below

The opinion of the Court of Appeals, filed July 22, 1982, is as yet unreported (Milltown, p. 1a et seq.).* The opinion

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* References herein to the opinions and judgments below will be by citation to the appendix to the petition for certiorari being filed in this matter by the Borough of Milltown (*e.g.*, Milltown, p. a).

of the District Court, filed August 11, 1981, is reported in 519 *F. Supp.* 878 (D.N.J. 1981) (Milltown, p. 33a et seq.). The judgments of those courts are set forth in the Milltown appendix, p. 30a and p. 53a, respectively.

Jurisdiction

Jurisdiction of this Court is pursuant to 28 *U.S.C.* §1254. Jurisdiction of the Court of Appeals was pursuant to 28 *U.S.C.* §1291. The jurisdiction of the District Court was based upon 28 *U.S.C.* §1331 and 28 *U.S.C.* §1441.

Statutes and Regulations

The statute here involved is 33 *U.S.C.* §1284(b)(1) and (4) [1982 Supp.] It reads as follows:

> §1284 (b)(1) Notwithstanding any other provision of this subchapter, the Administrator shall not approve any grant for any treatment works under section 1281(g)(1) of this title after March 1, 1973, unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share (except as otherwise provided in this paragraph) of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant; and (B) has legal, institutional, managerial, and financial capability to insure adequate construction, operation, and maintenance of treatment works throughout the applicant's jurisdiction, as determined by the Ad-

ministrator. In any case where an applicant which, as of December 27, 1977, uses a system of dedicated ad valorem taxes and the Administrator determines that the applicant has a system of charges which results in the distribution of operation and maintenance costs for treatment works within the applicant's jurisdiction, to each user class, in proportion to the contribution to the total cost of operation and maintenance of such works by each user class (taking into account total waste water loading of such works, the constitutent elements of the wastes, and other appropriate factors), and such applicant is otherwise in compliance with clause (A) of this paragraph with respect to each industrial user, then such dedicated ad valorem tax system shall be deemed to be the user charge system meeting the requirements of clause (A) of this paragraph for the residential user class and such small non-residential user classes as defined by the Administrator. In defining small non-residential users, the Administrator shall consider the volume of wastes discharged into the treatment works by such users and the constituent elements of such wastes as well as such other factors as he deems appropriate.

• • •

(4) A system of charges which meets the requirement of clause (A) of paragraph (1) of this subsection may be based on something other than metering the sewage or water supply flow of residential recipients of waste treatment services, including ad valorem taxes. If the sytems of charges is based on something other than metering the Administrator shall require (A) the applicant to establish a system by which the necessary funds will be available for the proper operation and maintenance of the treat-

ment works; and (B) the applicant to establish a procedure under which the residential user will be notified as to that portion of his total payment which will be allocated to the cost of the waste treatment services.

The regulations of EPA involved are lengthy and are set forth in the appendix hereto (pp. 1a *et seq.*). They are 40 C.F.R. §35.929-1, §35.929-2(e), (g) and §35.935-13(a), (c).

Statement of the Case

Statement of Facts

Petitioner Middlesex County Utilities Authority (MCUA) is a New Jersey public body, having statutory authority for the regional treatment of waste water of such municipalities as choose to participate in it. For many years it has operated such a facility. At present there are 25 municipal participants, comprising a population of approximately 600,000. There are also 10 industrial participants. MCUA has in process a project for new lines designed for the improvement of its waste treatment system. It is now about 97 per cent complete. An application for federal funding was made to EPA in respect of this project.

The impetus for the institution of this construction project came from the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"), 33 *U.S.C.* §1251 *et seq.* The statute authorizes the setting of stringent new water pollution standards, applicable to public as well as private sources of waste water, by EPA and authorized state agencies under and pursuant to FWPCA. The objective of that statute was for complete purification of the nation's waters by 1985, 33 *U.S.C.* §1251(a)(1), and for

substantial progress in that direction by 1977. See *Milwaukee* v. *Illinois*, 451 *U.S.* 304, 310-311 (1981); *EPA* v. *State Water Resources Control Board*, 426 *U.S.* 200 (1976).

FWPCA contains generous provisions for funding of new or improved water treatment plants by public agencies, Congress realizing that the backlog of unmet waste treatment improvement projects could not be met by states and localities without massive federal aid. 33 *U.S.C.* §1281(a). See Senate Report No. 95-370 of the Committee on Environment and Public Works accompanying the bill which became the 1977 amendments of FWPCA. See 1977, 95th Cong. 1st Sess., 3 U.S. Code Cong. & Adm. News 4326, 4328, estimating the cost of eliminating the backlog in the construction of needed waste treatment public works at $60 billion, of which at least $45 billion would be required under then current grant policy.

MCUA applied to EPA for a grant toward construction of the lines construction project, and it was approved by EPA for the 75 per cent of cost allowed by law. 33 *U.S.C.* §1282(a)(1). The total cost of the project is $105,125,895 of which the EPA grant was $78,844,421. But EPA is holding back from MCUA over $9 million of the grant money now due for the following reason.

EPA asserts that MCUA is in default of a statutory condition for a grant, 33 *U.S.C.* §1284(b)(1)(4), that it procure the institution of user service charges by every contributor of waste within its jurisdiction. This is based on the absence of a user service charge in the Borough of Milltown, which has a contract going back to 1914 for the treatment of its waste by New Brunswick free of charge. New Brunswick is a participant in MCUA; Milltown is not. New Brunswick pays MCUA for treatment of the accumulated sewage of both New Brunswick and Milltown and itself has a satisfactory user charge system. But EPA as-

serts that Milltown must also adopt a sewer user charge ordinance in order for MCUA to qualify for its full grant. Under EPA regulations applicable to grants which had been approved prior to July 1, 1979, EPA asserts the right to withhold 20 per cent of a grant until the grantee effects adoption of user charge ordinances in all municipalities contributing waste to the grantee system. 40 *C.F.R.* §35.935.13(a) (p. 7a). As a result, if the position of EPA herein is sustained, MCUA will lose not only the $9 million plus withheld to date, but also the balance of the difference between the amount of the grant and the amount heretofore received by MCUA on account of the lines project—or a total loss of about $13.5 million.*

MCUA has done everything within its power to meet the EPA's requirement for the institution of a user charge system in every municipality contributing waste to its system. All 25 of its municipal participants with the exception of one,** have adopted user charge ordinances approved by

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* The impact of EPA's construction of the statute is dramatized by its regulation, 40 C.F.R. 35.935-13(c) (p. 8a), under which no grants in any percentage will be made on applications submitted after June 30, 1979 unless EPA has approved the user charge system of the grantee. This would have cost MCUA a $27 million federal grant for construction of a dewatering plant which MCUA had planned as part of a program for transferring disposition of sewage sludge from dumping in the ocean to land-based facilities. MCUA applied for a grant on that project, but the project is now inactive.

** The exception is the Borough of Sayreville, which has adopted a user charge system only for industries. It has refused to adopt such a system for residences. However, MCUA has obtained a state court judgment ordering Sayreville to comply with its agreement with MCUA to adopt a user charge ordinance satisfactory to EPA. Although Sayreville has appealed that judgment, MCUA considers the appeal frivolous and expects Sayreville shortly to come into compliance. Thus the Milltown situation is now the only realistic bar to release of MCUA's impounded funds.

EPA. MCUA is powerless to abrogate the 1914 contract between New Brunswick and Milltown under which New Brunswick undertook to handle Milltown's sewage without charge. The origin of that contract is described in *New Brunswick* v. *Milltown*, 3 N. J. Super. 113, 65 A. 2d 621 (App. Div. 1949), wherein the validity of the contract was sustained as against an effort by New Brunswick to have it declared of no further effect. A previous effort by New Brunswick to be relieved of the contract also met with failure. *New Brunswick* v. *Milltown*, 135 N. J. Eq. 310, 38 A. 2d 288 (Ch. 1944). Later New Brunswick joined the MCUA system.

New Brunswick has a user charge ordinance under which all users, industrial and domestic, are charged on the basis of flow, determined either by metered readings of sewage flow or by use of water consumption records. This concededly satisfies EPA requirements for a user charge system. The users in New Brunswick absorb the cost of treating the Milltown sewage by the incorporation of the latter in the gross New Brunswick flow the cost of which is apportioned to New Brunswick users under the approved New Brunswick user charge plan.

The *de minimis* extent of the Milltown contribution of waste to the New Brunswick-MCUA system is reflected by the fact that according to the 1980 census the population of Milltown is 7,136 and that of all municipalities contributing waste to the system is 599,640, or a ratio of 1.2 per cent. These are facts susceptible of judicial notice. F.R. Evid. R. 201(b).

The refusal of EPA to advance the balance of construction grant money due MCUA has seriously burdened MCUA by virtue of the consequent necessity to seek expensive interim financing to satisfy its obligations to contractors for construction work completed to date. Perma-

nent withholding of the grant money from MCUA would force MCUA into the public bond market to raise the additional $13.50 million which will have become due when construction is completed. This will place a serious and unanticipated additional burden on the municipal participants in the MCUA system.

The course of the litigation leading to the upholding of the position of EPA in the lower courts is adequtely detailed in the opinion of the Court of Appeals (Milltown, pp. 8-12a).

ARGUMENT

Petitioner advances the following reasons for the grant of certiorari.

I.

The determination of the Court of Appeals that the action of EPA does not contravene 33 U.S.C. §1284 (b) (1) (4) is erroneous and constitutes a decision of an important question of federal law which has not been, but should be, settled by this Court.

The importance of the federal sewer construction grant program in the attainment of the goal of purification of the nation's waters under FWPCA can hardly be overstated. The congressional declaration of goals and policy, 33 *U.S.C.* §1251, included the statements:

> "(a)(1) It is the national goal that the discharge of pollutants in the navigable waters be eliminated by 1985;
>
> • • •

> (4) It is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;"

A cogent statement of the close relationship of federal funding of municipal construction or improvement of sewerage plants to the objective of cleaning up the nation's waters is set forth in a footnote in *Train* v. *City of New York*, 420 U.S. 35, 45 (1975).

There are said to be some 30,000 local governmental sewerage agencies potentially eligible for federal construction grants, and Congress has recognized that many of them may have peculiarly unique legal and financial factors that should be taken into account by EPA in passing upon sewer user charge systems submitted to qualify for grants under Section 1284(b)(1)(4). Thus in proposing the requirement for user charge plans, the Senate Committee stated:

> Although the committee is aware of *the many different legal and financial circumstances* that characterize state and local governments and agencies throughout the country, the bill directs the Administrator to promulgate guidelines for the establishment and imposition of user charge systems as a guide to grant applicants for waste treatment works grants. These guidelines *should take into account the diversity of legal and financial factors that exist from jurisdiction to jurisdiction,* and each applicant should be permitted *reasonable flexibility* in the design of a system of user charges that meets *the unique requirements of his own jurisdiction.* As a general rule, the volume and character of each discharge into a publicly owned system should form the basis of determining the rate at which each user should be required to pay." (emphasis added).

2 U.S. Code Cong. & Adm. News (1972 92nd Cong. Sec. Sess.) p. 3668, 3695.

A.

The intent of Congress was for reasonable flexibility in the design of user charge systems. The EPA regulations negate the congressional objective of flexibility.

The lower courts unfortunately misread and misinterpreted the foregoing evidence available from the legislative history as to the congressional intent with respect to the user charge requirement. They recognized that flexibility in the design of sewer charge systems was required, but they failed to read the reference to flexibility in the committee report *in pari materia* with that concerning *"diversity of legal and financial factors"* in different jurisdictions. The New Brunswick-Milltown contract is clearly a "unique" legal and financial factor necessarily affecting any MCUA sewer user charge system, and it was plainly the intent of Congress that such a circumstance should be accommodated in any EPA guidelines governing a particular grant application. Since New Brunswick by contract assumes Milltown's sewage treatment free of charge, it defies reason to require payment of a user charge by Milltown's property owners. The view of the lower courts that in these circumstances EPA could justify denial of 20 per cent of the MCUA lines grant upon absence of a user charge in Milltown not only ignores the legislative committee admonition concerning unique legal and financial circumstances of a grantee but sanctions a narrow and irrational administrative approach to one section of the water pollution control legislation which undermines a major objective and *raison d'etre* of the statute as a whole—the reduction of water pollution by con-

struction and improvement of sewerage treatment facilities. If the statute authorizes withholding 20 per cent, it authorizes withholding 100 per cent. This seems unthinkable in terms of legislative intent applied to these facts.

MCUA has insisted upon the adoption of a satisfactory user charge system by every municipal participant in the system. Milltown is not a participant, but the users in New Brunswick are carrying, on a user charge basis, the cost of treating the Milltown sewage. Moreover, MCUA is doing whatever it can in the pending state-court litigation to assist New Brunswick in abrogating the Milltown contract to the end that Milltown also adopt a user charge system. MCUA is clearly in substantial compliance with the statute, sensibly construed.

B.

The statutory policy of financial stability underlying the requirement of user charge systems does not justify the manner of application of the requirement as imposed by EPA against MCUA.

EPA argues that the adoption of a user charge system by Milltown is an absolute condition for payment of the grant money to MCUA because there would otherwise be an impairment of the two alleged purposes of the statutory requirement: (a) achievement of economy of water and power through the incentives provided by user charges; and (b) making the grantee system financially self-sufficient afer construction of the new plant. We submit that the asserted economy-incentive purpose of the statutory requirement was not its real object and in any case has been largely dissipated by statutory amendments; and that the remaining true objective, *i.e.*, financial stability, is assured in the present circumstances.

Inspection of the legislative history indicates that the intent of Congress in providing for the user charge requirement was not at all that of incentive for economy by users but solely that of assuring financial security and stability of the grantee after construction. The only allusion in the Senate Committee report accompanying the 1972 bill as to the purpose of the user charge requirement was as follows:

> "Each system of user charges imposed pursuant to requirements of the bill must be designed in such a way as to generate sufficient revenues to operate and maintain the treatment works to which it applies.** The Committe bill anticipates that the agencies responsible for constructing and operating treatment works will, through the imposition of user charges, become financially self sufficient with respect to the operation and maintenance (including replacement as defined of treatment works) constructed with assistance pursuant to the Act."

1972, 92nd Cong. 2d Sess., 2 U.S. Code Cong. & Adm. News, 3668, 3695.

The 1977 report of the same committee corroborates the foregoing. After pointing out that prior to adoption of the 1972 statute a major problem "was the inability of the municipalities to sustain the cost of operation and maintenance of facilities constructed with federal grant money" because of the inadequacy of municipal budgets, etc. 1977, 95th Cong. 1st Sess., 3 U.S. Code Cong. & Adm. News, 4326, 4352, the Committee continued:

> "The concept of 'user charges' was originally proposed as a means of assuring that each federally assisted facility would have adequate operation and maintenance funds. In this way municipalities could

> employ their limited taxing powers in providing other forms of public services, and waste treatment facilities could be operated and maintained efficiently, thereby assuring adequate waste treatment services and a sound investment of federal dollars." (*Ibid.*)

The Committee went on to say that "further examination of the user charge concept revealed additional benefits", to wit, the encouragement of a more efficient management of wastes as well as economic inducement to reduce excessive use (*Ibid.*). The Committee was not, however, thereby indicating the *original purpose* of the user charge system but merely commenting on what might be deemed to be "additional benefits" *later perceived*. The lower courts were therefore in error in ascribing to Congress a twofold purpose in the user charge, *i.e.*, financial security *and* incentive against waste (Milltown, pp. 24a, 42a). The legislative history reveals that only the former motivated the adoption of the requirement.

Moreover, any economy-incentive aspect of the user charge system was largely downgraded by statutory amendments of the proviso in 1977 and 1980. Municipalities were permitted to create system whereby charges to residential and small industrial users could be based on ad valorem assessments and comparable measuring devices unrelated to volume of flow of water or sewage. Thus §1284 now provides:

> "(b) (4) A system of charges which meets the requirement of clause (A) of paragraph (1) of this subsection may be based on something other than metering the sewage or water supply flow of residential recipients of waste treatment services including ad valorem taxes".

The 1980 amendment of the section extends the permission to base the user charge system on an ad valorem basis to "such small non-residential user classes as defined by the Administrator". (See 1982 Supp. to 33 U.S.C. §1284). The intent, moreover, is to allow even charges "based on a flat fee per household or per plumbing fixture". 1977, 95th Cong. 1st Sess., 3 U.S. Code Cong. & Adm. News, 4326, 4351-4352.

In clear disagreement with the Court of Appeals that promotion of economy ranks with financial security as a legislative objective for the user charge requirement (Milltown, p. 24a) is the rationale in *Hotel Emp. Ass'n of San Francisco* v. *Gorsuch*, 669 F. 2d 1305, 1308 (Cir. 9 1982).

Insofar as concerns the true statutory object of requiring user charges—financial security of the grantee—the absence of user charges in Milltown does not disserve it one whit. New Brunswick's user charges against its own sewerage users carry the added costs of the Milltown load without threat of default, as they have been doing since 1914. There is not a remnant of evidence in this record for hypothesizing any threat to MCUA's financial stability in the Milltown situation, and the purported concern over it in the opinion of the Court of Appeals is but a strained makeweight for its decision. (Milltown, p. 24a, n. 18a). Far more of a threat to MCUA's financial welfare is EPA's withholding of the millions of dollars of undisbursed funds together with the resulting $1 million annual interest expense to MCUA on the additional construction debt.

C.

Milltown recipients of waste treatment services of MCUA are not within its "jurisdiction", within the intent of §1284 (b) (1) and therefore Milltown is not required to adopt a sewer user charge system.

The lower courts have agreed with EPA that the "recipients" in Milltown of the waste treatment services of MCUA *via* New Brunswick are within MCUA's "jurisdiction", as specified by the statutory language, and that therefore they must by a user charge system pay for such services (Milltown, p. 14a). The concept relied on is that "jurisdiction" means "territorial" jurisdiction and that the EPA Administrator reasonably so determined, as he was empowered to do by the statutory language. (*Ibid.*). Again, however, the lower courts have disregarded the contrary implications of the legislative history. As noted above, the Committee report directed that in fixing guidelines for user charge plans attention be given to different legal and financial circumstances affecting a grantee. It was thus plainly in mind that in the case of a regional agency grantee, existing contractual circumstances of a municipal participant might be such as to preclude payments by certain recipients of waste services. In that sense, the statutory references to "jurisdiction" must, as a functional matter, be taken to mean power to act rather than territorial jurisdiction. MCUA has no power to act to compel Milltown to adopt sewer charges because MCUA has no contract with Milltown. MCUA does have jurisdiction over New Brunswick, but no power through the latter to compel Milltown to do anything. The long standing contract of MCUA with New Brunswick as a participant in its system compels MCUA to treat Milltown's sewage so long as New Brunswick pays for it or until some court relieves New Brunswick of its ancient obligation to Milltown.

That the statute qualifies "jurisdiction" by the terms "as determined by the Administrator", does not render EPA's determination conclusive if unreasonable and not consistent with the purposes of the legislation. *Cf. Chrysler Corp.* v. *EPA*, 631 F. 2d 865, 884 (D.C. Cir), cert. den., 449 U.S. 1021 (1980). The determination is both unreasonable and inconsistent with the purposes of the statute. Congress wants sewer projects improved with federally granted funds. It cannot have been the intent of Congress to authorize EPA, with one hand, to make substantial construction grants to MCUA, and with the other hand, to take away a substantial portion of the grant for a condition MCUA is powerless to do anything about—and which in no way impairs MCUA's financial security.

Whether or not the foregoing definitional argument is accepted, it is apparent that MCUA has substantially performed the statutory condition of creation of a user charge system whereby users in all participating municipalities carry the financial burden of the total costs of operation and maintenance of MCUA's treatment plant, including costs attributable to Milltown (*via* the New Brunswick ratepayers). This constitutes adequate satisfaction of the legislative objective.

Nor should our position be rejected by reason of EPA regulation §35.929-2(e) (p. 6a). This recites that "If the project is a regional treatment system accepting wastewaters from other municipalities, the subscribers receiving waste treatment services from the grantee shall adopt user charge systems in accordance with section 204(b)(1) [§1284(b)(1)] of the Act and §§35.929 through 35.929-3. * * *." The key word here is "subscribers". Milltown is not a subscriber of MCUA. The use of the word "municipalities" in the next sentence of the regulation is not significant. That sentence is intended

only to require that user charge systems be incorporated in formal municipal legislation. The "municipalities" there referred to are the "subscribers" denominated in the substantive part of the regulation. See the additional references to "subscribers" in a regional system throughout regulation §35.929-1 (p. 1-5a).

If the regulation is not confined to subscribers of the grantee, it is invalid as in contravention of the statute pursuant to which the regulation was promulgated, the coverage of the statute being confined to "recipients" within the "jurisdiction" of the grantee. The coexistence of "jurisdiction" in the statute and "subscribers" in the regulation confirms our case for legislative intent.

D.

Deference to administrative expertise and discretion does not justify the decisions below since the action of EPA defies all indicia of legislative intent and purpose.

EPA and the lower courts have confined themselves to a hyper-literal reading of §1284(b)(1)(4) to the disregard or minimization of the obvious strong intent of Congress that water pollution be reduced by federally financed sewerage improvement projects, provided only that user charge systems be imposed by grantees assuring their financial security. MCUA has met that requirement. But a contrary conclusion has here been rested on the doctrine of reliance on the "deference" to be accorded to administrators' interpretation of regulatory statutes. (Milltown, pp. 12-13a). However, there is no rule of statutory construction more firmly established than that the letter of a statute must bow to its purpose and object as revealed by legislative his-

tory and all of the circumstances attendant upon enactment. *Steelworkers* v. *Weber*, 443 U.S. 193, 202 (1979) ("It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers'"); *Muniz* v. *Hoffman*, 422 U.S. 454, 469 (1975); *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Train* v. *Colorado Pub. Int. Research Group*, 426 U.S. 1, 10 (1976) ("'when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on superficial examination'"); *United States* v. *American Trucking Association*, 310 U.S. 934, 943 (1940) ("even when the plain meaning [of statutory language] did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' [the court] has followed the purpose, rather than the literal words.")

We submit the result arrived at below meets all of the invidious characterizations just quoted.

Despite the principle that courts will ordinarily accord deference to administrative construction of statutes administered by such agencies, there has been no hesitation in judicial nullification of EPA regulations when contrary to plain statutory intent. *Natural Resources Defense Council Inc.* v. *Costle*, 568 F. 2d. 1369 (Cir. D.C. 1977); *Campaign Clean Water Inc.* v. *Train*, 489 F. 2d 492 (Cir. 4. 1973), vacated on other grounds, 420 U.S. 136 (1975); *Dobbs* v. *Costle*, 559 F. 2d. 946, 949-950 (Cir. 5. 1977). The same rule has been widely applied also in other administrative fields. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 410-411 (1979); *Consolidated Rail Corp.* v. *United States*, 619 F. 2d. 988-993 (Cir. 3 1980); *Quinn* v. *Butz*, 510 F. 2d. 743 (Cir.

D.C. 1975). "[A]n [administrative] interpretation which emasculates a provision of a statute is not to be preferred * * *." *Marsano* v. *Laird,* 412 F. 2d. 65, 70 (Cir. 2 1969). Distinguish the situation where the court finds an agency's interpretation of the statute to be "reasonable", as in *EPA* v. *Nat'l. Crushed Stone Ass'n.,* 449 U.S. 64, 83-84 (1981).

It is recognized that a general administrative regulation may be appropriate providing the rule contains provision for "correction of injustices" under the rule by special application. See *National Nutriti. nal Foods Ass'n* v. *Food & Drug Admin.,* 504 F. 2d 761, 784 (Cir. 2 1974). In the present instance EPA has, by misreading legislative history, rigidified the statute by its regulations and failed to create an exception to avert the obvious injustice and perversion of the legislative intent represented by the plight of MCUA if denied its full grant in these circumstances.

II.

To the extent that the statute vests discretion in EPA in determining the adequacy of a user charge system, the action of EPA constitutes an abuse of discretion and is arbitrary, capricious and unreasonable.

In Point I of this argument we have contended that the regulations under whose purported authority EPA is withholding grant funds from MCUA are invalid because contrary to the intent and purpose of the enabling statute. We now contend, in the alternative, that to the extent that the statute reposes discretion in EPA for the adoption of regulations controlling user charge systems adopted by grant applicants, the exercise of such discretion by EPA in the present case is invalid because so arbi-

trary and unreasonable as to constitute an abuse of discretion under the attendant circumstances. 2 Davis, *Administrative Law Treatise* (1980) 7.8, 36; *Batterton* v. *Francis,* 432 U.S. 416, 425 (1977); *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 141 (1976); *Starr* v. *Federal Aviation Administration,* 589 F. 2d. 307, 311 (Cir. 7 1979).

In the present case it is, of course, our contention that EPA's denial of grant funds to MCUA under its regulations ignored factors which Congress indicated were highly significant to its overall purpose of reducing pollution in the nation's waters: (a) to aid construction of improved municipal sewerage facilities by grants of funds and thereby work to eliminate pollution of waters; (b) to insure financial stability of grantees of federal construction funds; and (c) to allow for particular legal and financial circumstances of a grantee in passing upon the user charge system of the grantee. Moreover, EPA gave undue weight to the alleged economy-incentive aspect to the extent that it was (we contend it was not) a legislative object.

We incorporate by reference all of the substantive contentions made in Point I hereinabove demonstrating the egregious unreasonableness of denying MCUA the substantial grant funds yet due it on the insubstantial, arbitrary and *de minimis* basis assigned by EPA for its action.*

In summary:

1. Despite the absence of user charges in Milltown, user charges are in effect (subject to the enforcement of the Sayreville judgment, see p. 6 n.) as to almost 99 percent of the sewage flow of the MCUA system.

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* The imperilment of the MCUA grant over the New Brunswick-Milltown impasse recalls the plight of the monarch who lost a kingdom for lack of a nail to shoe his horse. Shakespeare, King Richard III, Act V, Scene IV.

2. Milltown is not a participant in or subscriber to the MCUA system.

3. The New Brunswick-Milltown contract has twice been upheld by the New Jersey courts.

4. MCUA has no power to impose a user charge system upon Milltown, but is supporting New Brunwick's litigative effort toward that end.

5. The absence of user charges in Milltown does not affect the financial security of the MCUA system since the users in New Brunswick are carrying the costs of treating Milltown sewerage.

6. The curtailment of grant funds to MCUA is a threat to achievement of its program for upgrading its sewage treatment facilities. It also subjects MCUA and its municipal participants to heavy and unanticipated additional financial burdens. It thus both tends to subvert MCUA's financial security and to thwart its compliance with the water pollution abatement objectives of vital federal environmental legislation.

It is accordingly submitted that to the extent that the action of EPA here impugned is sought to be justified by the exercise of administrative discretion, the agency action is invalid for arbitrariness, unreaonableness and abuse of discretion.

CONCLUSION

It is submitted that the Court should issue its writ to review the decision of the Court of Appeals to the end that this first-instance but important question of environmental law be settled by the Court. The narrow, unreasonable and incorrect interpretation by EPA of the grant provisions of FWPCA threatens seriously to undermine the legislative intent for federal financing of sewerage construction costs and thus an essential element of the program for purification of the nation's waters. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX*

EPA Regulations

40 C.F.R. §35.929-1

The Regional Administrator may approve a user charge system based on either actual use under paragraph (a) of this section or ad valorem taxes under paragraph (b) of this section. The general requirements in §§35.929-2 and 35.929-3 must also be satisfied.

(a) *User charge system based on actual use.* A grantee's user charge system based on actual use (or estimated use) of waste water treatment services may be approved if each user (or user class) pays its proportionate share of operation and maintenance (including replacement) costs of treatment works within the grantee's service area, based on the user's proportionate contribution to the total waste water loading from all users (or user classes). To insure a proportional distribution of operation and maintenance costs to each user (or user class), the user's contribution shall be based on factors such as strength, volume, and delivery flow rate characteristics.

(b) *User charges based on ad valorem taxes.* A grantee's user charge system (or the user charge system of a subscriber, i.e., a constituent community receiving waste treatment services from the grantee) which is based on ad valorem taxes may be approved if it meets the requirements of paragraphs (b) (1) through (b) (7) of this section. If the Regional Administrator determines that the grantee did not have a dedicated ad valorem

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* For the remaining rule requirments of the Appendix we rely upon the Appendix to the Petition for Certiorari being filed in this matter by Borough of Milltown.

tax system on December 27, 1977, meeting the requirements of paragraphs (b) (1) through (b) (3) of this section, the grantee shall develop a user charge system based on actual use under §35.929-1(a).

(1) The grantee (or subscriber) had in existence on December 27, 1977, a system of ad valorem taxes which collected revenues to pay the cost of operation and maintenance of waste water treatment works within the grantee's service area and has continued to use that system.

(2) The grantee (or subscriber) has not previously obtained approval of a user charge system on actual use.

(3) The system of ad valorem taxes in existence on December 27, 1977, was dedicated ad valorem tax system.

(i) A grantee's system will be considered to be dedicated if the Regional Administrator determines that the system meets all of the following criteria:

(A) The ad valorem tax system provided for a separate tax rate or for the allocation of a portion of the taxes collected for payment of the grantee's costs of waste water treatment services;

(B) The grantee's budgeting and accounting procedures assured that a specified portion of the tax funds would be used for the payment of the costs of operation and maintenance;

(C) The ad valorem tax system collected tax funds for the costs of waste water treatment services which could not be or historically were not used for other purposes; and

EPA Regulations

(D) The authority responsible for the operation and maintenance of the treatment works established the budget for the costs of operation and maintenance and used those specified amounts solely to pay the costs of operation and maintenance.

(ii) A subscriber's system based on ad valorem taxes will be considered to be dedicated if a contractual agreement or a charter established under State law existed on December 27, 1977, which required the subscriber to pay its share of the cost of waste water treatment services.

(4) A user charge system funded by dedicated ad valorem taxes shall establish, as a minimum, the classes of users listed below:

(i) Residential users, including single-family and multi-family dwellings, and small nonresidential users, including nonresidential commercial and industrial users which introduce no more than the equivalent of 25,000 gallons per day of domestic sanitary wastes to the treatment works;

(ii) Industrial and commercial users:

(A) Any nongovernmental user of publicly owned treatment works which discharges more than 25,000 gallons per day (gpd) of sanitary waste; or a volume of process waste, or combined process and sanitary waste, equivalent to 25,000 gpd of sanitary waste. The grantee, with the Regional Administrator's approval, shall define the strength of the residential discharges in terms of parameters including, as a minimum, biochemical oxygen demand (BOD) and suspended solids (SS) per volume of flow. Dischargers with a volume exceeding 25,000

gpd or the weight of BOD or SS equivalent to that weight found in 25,000 gpd of sanitary waste are considered industrial users.

(B) Any nongovermental user of a publicly owned treatment works which discharges wastewater to the treatment works which contains toxic pollutants or poisonous solids, liquids, or gases in sufficient quantity either singly or by interaction with other wastes, to contaminate the sludge of any municipal systems, or to injure or to interfere with any sewage treatment process, or which constitutes a hazard to humans or animals, creates a public nuisance, or creates any hazard in or has an adverse effect on the waters receiving any discharge from the treatment works.

(iii) Users which pay no ad valorem taxes or receive substantial credits in paying such taxes, such as tax exempt institutions or governmental users, but excluding publicly owned facilities performing local governmental functions (e.g., city office building, police station, school) which discharge solely domestic wastes.

(5) The grantee must be prepared to demonstrate for the Regtional Administrator's approval that its system of evaluating the volume, strength, and characteristics of the discharges from users or categories of users classified within the subclass of small nonresidential users is sufficient to assure that such users or the average users in such categories do not discharge either toxic pollutants or more than the equivalent of 25,000 gallons per day of domestic wastewater.

(6) The ad valorem user charge system shall distribute the operation and maintenance costs for all treatment works in the grantee's jurisdiction to the residential and small nonresidential user class, in proportion to the use of

the treatment works by this class. The proportional allocation of costs for this user class shall take into account the total waste water loading of the treatment works, the constituent elements of the wastes from this user class and other appropriate factors. The grantee may assess one ad valorem tax rate to this entire class of users or, if permitted under State law, the grantee may assess different ad valorem tax rates for the subclass of residential users and the subclass of small nonresidential users provided the operation and maintenance costs are distributed proportionately between these subclasses.

(7) Each member of the industrial and commercial user class described under paragraph (b) (4) (ii) of this section and of the user class which pays no ad valorem taxes or receives substantial credits in paying such taxes described under paragraph (b) (4) (iii) of this section shall pay its share of the costs of operation and maintenance of the treatment works based upon charges for actual use (in accordance with §35.929-1(a). The grantee may use its ad valorem tax system to collect, in whole or in part, those charges from members of the industrial and large commercial class where the following conditions are met:

(i) A portion of all of the ad valorem tax rate assessed to members of this class has been specifically designated to pay the costs of operation and maintenance of the treatment works, and that designated rate is uniformly applied all members of this class:

(ii) A system of surcharges and rebates is employed to adjust the revenues from the ad valorem taxes collected from each user of this class in accordance with the rate designated under paragraph (b) (7) (i) of this section, such that each member of the class pays a total charge for its share of the costs of operation and maintenance based upon actual use.

EPA Regulations

40 C.F.R. §35.929-2

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(e) *Adoption of system.* One or more municipal legislative enactments or other appropriate authority must incorporate the user charge system. If the project is a regional treatment system accepting wastewaters from other municipalities, the subscribers receiving waste treatment services from the grantee shall adopt user charge systems in accordance with section 204(b)(1)(A) of the Act and §§ 35.929 through 35.929-3. These user charge systems shall also be incorporated in appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing wastes to the treatment works. The public shall be informed of the financial impact of the user charge system on them and shall be consulted, prior to adoption of the system, in accordance with 40 CFR Part 25.

• • •

(g) *Inconsistent agreements.* The grantee may have pre-existing agreements which address: (1) The reservation of capacity in the grantee's treatment works, or (2) the charges to be collected by the grantee in providing wastewater treatment services or reserving capacity. The user charge system shall take precedence over any terms or conditions of agreements or contracts between the grantee and users (including industrial users, special districts, other municipalities, or Federal agencies or installations) which are inconsistent with the requirements of section 204 (b)(1)(A) of the Act and these regulations.

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EPA Regulations

40 C.F.R. §35.935-13

The grantee shall obtain the approval of the Regional Administrator of its system of user charges. (See also §35.929 et seq.).

(a) *Step 3 grant assistance awarded under regulations promulgated on February 11, 1974,* (1) Except as paragraph (a)(2) of this section provides, the grantee must obtain the Regional Administrator's approval of its system of user charges based on actual use which complies with §35.929-1(a). The Regional Administrator shall not pay more than 50 percent of the Federal share of any step 3 project unless the grantee has submitted adequate evidence of timely development of its system of user charges nor shall the Regional Administrator pay more than 80 percent of the Federal share unless he has approved the system.

(2) A grantee which desires approval of a user charge system based on ad valorem taxes in accordance with §35.929-1(b) shall submit to the Regional Administrator by July 24, 1978, evidence of compliance of its system with the criteria in §35.929-1 (b)(1) through (b)(3). As soon as possible the Regional Administrator shall advise the grantee if the system complies with §35.929-1 (b)(1). The Regional Administrator's determination may be appealed in accordance with Subpart J, "Disputes," of Part 30 of this subchapter.

(i) *Grantees whose ad valorem tax systems meet the criteria of §35.929-1 (b)(1) through (b)(3).* Any step 3 payments held by the Regional Administrator at 50 percent or 80 percent for failure to comply with the requirement for development of a user charge system shall be released. However, the grantee shall obtain approval

EPA Regulations

of its user charge system by June 30, 1979 or no further payments will be made until the system is approved and the grants may be terminated or annulled.

(ii) *Grantees whose ad valorem tax systems do not meet the criteria of §35.929-1 (b)(1) through (b)(3).* Step 3 grants will continue to be administered in accordance with paragraph (a)(1) of this section.

• • •

(c) *Step 3 grant assistance awarded after June 30, 1979.* The Regional Administrator may not award step 3 grant assistance unless he has approved the user charge system based on actual use or ad valorem taxes. The Regional Administrator shall approve the grantee's user charge or ad valorem tax rates and the ordinance required under §35.929-2(e) and the grantee shall enact them before the treatment works constructed with the grant are placed in operation.

NOS. 82-662 and 82-703

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MIDDLESEX COUNTY UTILITIES AUTHORITY
(formerly Middlesex County Sewerage Authority),

Petitioner,

v.

CITY OF NEW BRUNSWICK, BOROUGH OF MILLTOWN and THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

and

BOROUGH OF MILLTOWN,

Petitioner,

v.

CITY OF NEW BRUNSWICK and THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

BRIEF OF RESPONDENT, CITY OF NEW BRUNSWICK, IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether the user charge system prerequisite for federal sewer construction grants to public sewerage agencies under the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1284(b)(1), authorizes the United States Environmental Protection Agency to withhold federal grant funds to a regional public sewerage agency because a municipality whose sewage waste is treated by the regional agency has failed to adopt a system under which the individual contributors to the municipal sewage flow pay proportionate operation and maintenance costs of the regional sewerage agency?

2. Whether the United States Environmental Protection Agency abused its statutory discretion in deciding to withhold federal sewer construction grant funds from a regional public sewerage agency that receives and treats waste from a municipality that has not established a user charge system?

3. Whether 33 U.S.C. §1284(b)(1) unconstitutionally impairs a contract between the City of New Brunswick and the Borough of Milltown pursuant to which New Brunswick has to date disposed of Milltown's sewage for no monetary charge?

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Opinions Below

The opinion of the Court of Appeals, Third Circuit, is reported at 686 F.2d 120 (1982) and is set forth at pages 1a-29a of the appendix to the petition for certiorari filed by the Borough of Milltown (Milltown). The opinion of the District Court, New Jersey, is reported at 519 F.Supp. 878 (1981) and is set forth at pages 33a-52a of the appendix to the Milltown petition. The judgments of the Court of Appeals and the District Court are set forth at pages 30a-32a and pages 53a-56a of the Milltown appendix, respectively.

Jurisdiction

The City of New Brunswick refers the Court to the jurisdictional statement set forth at page two of the petition for certiorari filed by the Middlesex County Utilities Authority (MCUA).

Statutes and Regulations

The statute at issue to this matter is 33 U.S.C. §1284(b). The statute is set forth at pages 2-4 of the MCUA petition. The petitions for certiorari also are directed toward several regulations of the United States Environmental Protection Agency (EPA). These regulations are identified and set forth in the MCUA petition and the appendix thereto.

Statement of the Case

In August 1980, respondent, the City of New Brunswick (New Brunswick), instituted suit against Milltown

and MCUA in the Superior Court of New Jersey. The action focused upon a 1914 contract between New Brunswick and Milltown which obligates New Brunswick to receive and dispose of Milltown sewage. Alleging that federal water pollution law required that Milltown pay a share of the cost of operating and maintaining the MCUA treatment system, New Brunswick sought a mandatory injunction compelling such relief. In addition, New Brunswick further alleged that drastic changes in water pollution control law and other material changes in circumstances rendered the 1914 contract void.[1] On that ground, New Brunswick sought declaratory relief. In November 1980, MCUA brought EPA into the state court litigation as a third-party defendant. EPA then removed the action to the federal courts.

MCUA's third-party complaint against EPA was based upon EPA's partial withholding of water pollution control grant funds from MCUA. Relying upon 33 U.S.C. §1284(b) and 40 C.F.R. §35.935-13(a)(1), EPA refused to completely fund a construction grant to MCUA unless Milltown, a municipality within the MCUA district,[2] adopted a user charge system. MCUA and Milltown have twice unsuccessfully argued that this EPA determination

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[1] The 1914 contract has been twice held valid by the New Jersey courts. *New Brunswick* v. *Milltown*, 135 N.J.Eq. 310, 38 A.2d 288 (Ch. 1944); *New Brunswick* v. *Milltown*, 3 N.J.Super. 113, 65 A.2d 621 (App. Div. 1949). As a result of the decisions below which remand part of the removed action back to state court, a New Jersey court will again decide this issue within a matter of months.

[2] MCUA has stressed in its petition that Milltown is not a participant in the MCUA. However, it is not disputed that Milltown is located in the MCUA district area and never exercised its statutory right to be excluded from this district. *See*, N.J.S.A. 40:14A-4(g) (West 1982).

is inconsistent with the language and purpose of 33 U.S.C. §1284(b). Milltown has also twice unsuccessfully argued that EPA application of 33 U.S.C. §1284(b) unconstitutionally impairs Milltown's 1914 contract with New Brunswick.[3] It is within this factual setting that both MCUA and Milltown have petitioned for a writ of certiorari.

Summary of Argument

Respondent, New Brunswick, argues that the petitions for certiorari that have been filed by MCUA and by Milltown should be denied because the decision below gave full consideration to all issues and decided these issues correctly. In addition, New Brunswick asserts that both petitioners fail to identify any of the special and important considerations necessary for the granting of the discretionary writ of certiorari.

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[3] Having initially argued this position before the District Court, MCUA abandoned this argument on appeal to the Court of Appeals. *See, City of New Brunswick* v. *Borough of Milltown*, 686 F.2d 120, 133 (3d Cir. 1982) (footnote 21) (Milltown Appendix A, p. 25a).

ARGUMENT

POINT I

Petitioners have failed to identify any important issue of federal law which has not been, but should be, settled by this Court.

In separate petitions for certiorari that have been filed with this Court, MCUA and Milltown argue that the decision below raises substantial issues of federal law that should be settled by the Court. Insofar as judicial review of 33 U.S.C. §1284(b)(1) is concerned, petitioners are correct in that the Supreme Court has not yet issued an opinion that construes this statute. Petitioners fail to recognize, however, that the issues raised in the decision below are common to judicial review of any federal statute and not just 33 U.S.C. §1284(b)(1). As a result, these "novel" issues of federal law are, in actuality, questions that have been long since addressed by this Court.

A.

The Court of Appeals properly deferred to the interpretation given to 33 U.S.C. §1284(b)(1) by the agency charged with the administration of the statute, the Environmental Protection Agency.

In the decision below, the Court of Appeals recognized that the issue before the Court centered upon interpretation of a statute by an administrative agency, EPA. Writing for the Third Circuit, Circuit Judge Garth acknowledged the well-established principle that a reviewing court should show great deference to agency interpretation of a

statute.[4] As recognized by this Court in reviewing yet another section[5] of the Clean Water Act,[6]

> It is now a commonplace that "when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16, 13 L.Ed. 2d 616, 85 S.Ct. 792 (1965).

EPA v. *National Crushed Stone Assn.*, 449 U.S. 64, 83, 66 L.Ed.2d 268, 101 S.Ct. 295 (1980).

In the petitions at bar, MCUA and Milltown argue that 33 U.S.C. §1284(b)(1) has been improperly construed by EPA. Notwithstanding the expertise of EPA in interpreting environmental legislation,[7] petitioners argue that the agency interpretation is unreasonable when measured against the language and purpose of the statute. Petitioners are wrong. The EPA interpretation is consistent with the statute's language and legislative history.[8] The EPA interpretation is therefore reasonable and does not present any of the special considerations necessary for the granting of the discretionary writ of certiorari.

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[4] *City of New Brunswick* v. *Borough of Milltown*, 686 F.2d 120, 127 (3d Cir. 1982).

[5] 33 U.S.C. §1314.

[6] 33 U.S.C. §§1251 *et seq.*

[7] *See, Chrysler Corp.* v. *EPA*, 631 F.2d 865, 884 (D.C.Cir. 1980), *cert. denied* 449 U.S. 1021 (1980).

[8] *See* Point I, B of this Argument.

B.

The determination of the Court of Appeals that the action of EPA does not contravene 33 U.S.C. §1284(b)(1) is totally consistent with the plain meaning and the legislative history of the statute.

The plain language of 33 U.S.C. §1284(b)(1) directs the Administrator of EPA not to release sewage treatment grant funds—

> . . . unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that *each recipient* of waste services *within the applicant's jurisdiction, as determined by the Administrator,* will pay its proportionate share . . . of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant . . . (emphasis added).

Neither the statute nor the act within which the statute is included defines the words "recipient" or "jurisdiction". The statute does, however, direct EPA to determine if a particular municipality or industry fits within the meaning of these terms.

In the case at bar, EPA interpreted 33 U.S.C. §1284 (b)(1) to require Milltown, a municipality within the MCUA district area, to adopt a user charge system in order that the MCUA receive sewage grant funding. The EPA interpretation was based upon findings that Milltown waste is processed in the MCUA plant and that Milltown is located within the MCUA service territory. These findings are not disputed by petitioners. The Court of Appeals and the District Court found that the EPA interpretation was reasonable. In view of this determination of reasonable

statutory interpretation by EPA, the petitions pending before this Court for a writ of certiorari present no important new issue of federal law and should be denied.

Notwithstanding the plain meaning of 33 U.S.C. §1284 (b)(1), petitioners also argue that EPA interpretation conflicts with the purposes underlying federal water pollution control legislation. As a result of this "conflict", petitioners assert that EPA does not have the authority tc withhold federal grant funds or has abused its discretion in withholding funds under the facts of this case. Petitioner's argument fails as it ignores the purposes specific to the user charge requirement.

As determined by the Court of Appeals in the decision below, Congress sought to promote water conservation through the user charge requirement of 33 U.S.C. §1284.

> [I]t is clear that one of the purposes of section 204's [33 U.S.C. §1284] user charge requirement is to promote water conservation. *See* S. Rep. No. 217, 95th Cong. 2d Sess. 27, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4326, 4352 ("A charge to the 'consumer' based on cost of treatment would be a positive force in encouraging more efficient management of wastes discharged through a municipal system as well as an economic inducement to reduce excessive use."). Although Congress in 1977 amended the Clean Water Act to allow charges to be based on ad valorem taxes or flat fees in certain cases rather than on direct measures of sewage flows such as metering, *see* 33 U.S.C. [1284(b)(4) (Supp. 1982), we cannot agree with appellants that in so doing Congress "eviscerated" any conservation purpose to the user charge requirement. On the contrary, conservation of water is heavily stressed in the legislative history to the 1977 amendments to the Clean Water Act. *See, e.g.,*

> 1977 U.S. Code Cong. & Ad. News at 4351. In our view, the 1977 amendments were intended simply to provide "greater flexibility . . . for the assessment of user charges," *id.* at 4352, and not to undermine the user charge concept itself of its underlying purposes (footnotes omitted).

City of New Brunswick v. *Borough of Milltown*, 686 F.2d 120, 133 (3d Cir. 1982). Absent a user charge system applicable to contributors to the Milltown sewage flow, the legislative purpose of water conservation is frustrated. Milltown residents would instead have every incentive to waste a natural resource—water. EPA's interpretation of 33 U.S.C. §1284(b) is therefore totally consistent with the purpose of the statute and should not form the basis for the granting of certiorari.

POINT II

There is no conflict among the federal courts of appeals as to the legislative purposes of 33 U.S.C. §1284(b)(1).

Petitioners have argued that the decision of the Court of Appeals, Third Circuit, below conflicts with a decision of the Court of Appeals, Ninth Circuit,[9] as to the legislative purposes of 33 U.S.C. §1284(b). New Brunswick strongly disagrees with petitioner's reading of *Hotel Emp. Ass'n* and asserts that the circuit courts do not conflict as to the purposes of 33 U.S.C. §1284(b).

In the decision below, the Third Circuit determined that Congress intended that EPA be flexible in the design of

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[9] *Hotel Emp. Ass'n of San Francisco* v. *Gorsuch*, 669 F.2d 1305 (9th Cir. 1982).

user charge systems.[10] The Third Circuit, however, also recognized that Congress intended that user charges promote water conservation and to ensure that each federally assisted waste disposal plant is economically self-sufficient in its operations.[11] Each of these policy considerations was important to the Third Circuit decision as the questions pending before the Court focused upon the very existence of a user charge system as opposed to the administration of an existing user charge system.

In contrast, the decision of the Ninth Circuit in *Hotel Emp. Ass'n* involved the administration of an existing user charge system. The Ninth Circuit was asked to decide how much each user should pay and not whether a specific municipal discharger should be excused from participation in the user charge system. As such, it is not surprising that the Ninth Circuit decision stresses the legislative purpose most relevant to administration—flexibility. The Ninth Circuit did not purport to set forth an exclusive listing of the purposes and policies underlying 33 U.S.C. §1284(b). The decision of the Third Circuit below merely supplements the analysis of the Ninth Circuit in *Hotel Emp. Ass'n*. Petitioners allegations of conflict among the circuit courts is not supported by the cited authorities.

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[10] *City of New Brunswick* v. *Borough of Milltown*, 686 F.2d 120, 132 (3d Cir. 1982).

[11] Id. at 133.

POINT III

Milltown has conceded that the issue of contract impairment does not support granting of a writ of certiorari.

In its petition for certiorari, Milltown has admitted that the Third Circuit decision does not create an issue of impairment of contract that would support granting of certiorari. New Brunswick has merely reframed this question in the event that jurisdiction is accepted by the Court.

CONCLUSION

It is submitted that the Court should deny issuance of its writ to review the decision of the Court of Appeals because petitioners have failed to identify any of the special and important reasons necessary for acceptance of jurisdiction. The decision below is founded upon long-standing decisions of this Court and presents no novel issue of federal law. The decision below does not conflict with the holding of any other Circuit Court of Appeals. The petitions of MCUA and Milltown should therefore be denied.

Respectfully submitted,

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Nos. 82-662 and 82-703

In the Supreme Court of the United States

OCTOBER TERM, 1982

MIDDLESEX COUNTY UTILITIES AUTHORITY, PETITIONER

v.

CITY OF NEW BRUNSWICK, ET AL.

BOROUGH OF MILLTOWN, PETITIONER

v.

CITY OF NEW BRUNSWICK, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

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QUESTION PRESENTED

Whether the Environmental Protection Agency erred in withholding sewage treatment grant funds from the Middlesex County Utilities Authority (MCUA) under Section 204(b)(1) of the Clean Water Act of 1977, 33 U.S.C. (Supp. V) 1284(b)(1), because the Borough of Milltown, whose sewage is treated by MCUA, has not adopted a system of user charges as required by statute.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a)[1] is reported at 686 F.2d 120. The opinion of the district court (Pet. App. 33a-52a) is reported at 519 F. Supp. 878.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a-32a) was entered on July 22, 1982. The petition

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[1] "Pet. App." refers to the appendix in No. 82-703.

for a writ of certiorari in No. 82-662 was filed on October 12, 1982. The petition for a writ of certiorari in No. 82-703 was filed on October 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Middlesex County Utilities Authority (MCUA) operates a regional sewage treatment plant at Sayreville, New Jersey, which receives sewage flows from New Brunswick, Milltown, and several other New Jersey municipalities. As a result of a 1914 contract between New Brunswick and Milltown, the sewage from Milltown flows free of charge from Milltown to New Brunswick, and the combined flows from both municipalities are then transmitted to and treated at the MCUA plant.[2] New Brunswick pays MCUA for treatment of its own and of Milltown's sewage. Milltown pays no fee either to New Brunswick or to MCUA.

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[2] New Brunswick agreed, without any time limitation and without any charge to Milltown, to accept Milltown's sewage in the New Brunswick system and to dispose of it in the same manner as its own sewage. New Brunswick accepted this responsibility in return for Milltown's commitment to discontinue discharging its sewage into Lawrence Brook, a source of drinking water for New Brunswick. The validity of this contract twice has been upheld by the New Jersey state courts. *City of New Brunswick* v. *Borough of Milltown*, 3 N.J. Super. 113, 65 A.2d 621 (App. Div. 1949); *City of New Brunswick* v. *Borough of Milltown*, 135 N.J. Eq. 310, 38 A.2d 288 (Ch. 1944). See Pet. App. 7a. The validity of the contract has been challenged by New Brunswick again in this case. That challenge was denied without prejudice by the district court so that it could be raised in state court (Pet. App. 51a-52a, 55a).

MCUA currently is expanding the interceptor lines to its Sayreville facility. MCUA has received grant assistance from EPA for this expansion pursuant to Title II of the Clean Water Act of 1977 (the "Act"), 33 U.S.C. (Supp. V) 1281 *et seq.* Title II establishes a grant program under which EPA may award federal funds for up to 75% of the construction costs of publicly-owned treatment works. The purpose of the program is to assist municipalities in treating wastes in compliance with the requirements of the Act (see Section 201(a), 33 U.S.C. 1281(a)). See Pet. App. 4a-5a.

The Act contains several restrictions on the granting of federal funds for the construction of sewage treatment facilities, including the requirement that each recipient of waste treatment services from the funded facility pay for the continued operation, maintenance, and replacement costs of the facility through user charges. Specifically, Section 204(b)(1) of the Act, 33 U.S.C. (Supp. V) 1284(b)(1), provides that the Administrator of the EPA may not approve any grant for a sewage treatment facility:

> unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share * * * of the cost of operation and maintenance (including replacement) of any waste treatment services provided by the applicant * * *.

Thus, the statute requires as a condition of receipt of federal sewage treatment grant funds that a municipal waste treatment plant adopt a system under which each individual home, business, and industry

that has wastes treated by that plant will pay its own proportionate share of treating its wastes.

EPA has issued regulations to implement the "user charge" requirement of Section 204(b)(1). Of particular relevance here is 40 C.F.R. 35.929-2(e), which provides that if a grant is for a regional treatment system, such as MCUA's, each municipality contributing wastes to the treatment works must adopt a user charge system. Because Milltown's sewage was treated by the MCUA system but Milltown had not adopted a system of user charges to pay for its proportionate share of waste treatment services, EPA determined that it could not fund MCUA's interceptor line expansion[3] beyond 80% of the grant award.[4]

2. In August 1980, New Brunswick instituted a suit in New Jersey state court against Milltown and MCUA. It sought an injunction and declaration that

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[3] As noted by MCUA (82-662 Pet. 6 n.**), the Borough of Sayreville, another municipality contributing sewage to MCUA's facility, has failed to adopt user charges for residences. EPA's decision to withhold grant funds was also based on Sayreville's failure to adopt a system of user charges. The court below did not consider the effect of Sayreville's failure to adopt a user charge system, but EPA's decision to withhold funds on that basis was recently upheld in another decision. *Middlesex County Utilities Authority* v. *Borough of Sayreville*, 690 F.2d 358 (3d Cir. 1982).

[4] Under 40 C.F.R. 35.935-13(a), for all grants awarded under EPA's 1974 regulations, such as MCUA's grant for the expansion of its Sayreville plant, the EPA Regional Administrator cannot pay more than 50% of a grant unless the grantee has "submitted adequate evidence of timely development of its system of user charges," and cannot pay more than 80% of a grant "unless he has approved the system." For all grants awarded after June 30, 1979, the Regional Administrator may not award any grant at all unless he has approved the user charge system. 40 C.F.R. 35.935-13(c).

the contract between itself and Milltown was void on several grounds, including the ground that Section 204(b)(1) required Milltown to pay its own share of the costs of operating and maintaining the MCUA facility (Pet. App. 8a-9a). In November 1980, MCUA brought EPA into the New Jersey litigation by naming it as a third-party defendant. In its third-party complaint, MCUA alleged that neither the Act nor its implementing regulations require Milltown to adopt a system of user charges and, moreover, that such a requirement would constitute an unconstitutional abrogation of the 1914 contract (*ibid.*). EPA then moved the action to the United States District Court for the District of New Jersey, where it answered and filed a counterclaim seeking both a declaration that Section 204(b)(1) authorizes EPA to withhold grant funds from MCUA pending adoption of user charges by Milltown and an injunction requiring Milltown to adopt such user charges or to cease sending its sewage through MCUA's facility for treatment (*ibid.*).

On motions for partial summary judgment by all parties, the district court decided all the federal issues in the case (Pet. App. 33a-52a). The court upheld EPA's authority to withhold grant funds from MCUA because of Milltown's failure to adopt a system of user charges. Specifically, the district court found that Milltown is a "recipient" of MCUA's "waste treatment services" within the meaning of Section 204(b)(1) (*id.* at 40a-41a). The court reviewed the legislative purposes and policies of the user charge requirement and found EPA's interpretation of the Act to be consistent with those purposes and policies (*id.* at 41a-43a). The court also rejected MCUA's and Milltown's claims that the withholding of grant

funds because of Milltown's failure to adopt user charges was an unconstitutional abrogation of the agreement between Milltown and New Brunswick, emphasizing that Congress can place reasonable limitations on its award of federal funds (*id.* at 43a-47a). The court dismissed EPA from the action and remanded the issue of the continued viability of the New Brunswick-Milltown contract to the state court (*id.* at 50a).

3. On appeal by MCUA and Milltown,[5] the Third Circuit affirmed the district court's decision (Pet. App. 1a-29a). The court explained that EPA's interpretation of Section 204(b)(1) was consistent with both the express language of the statute and the legislative purpose (*id.* at 13a-25a). Accordingly, the court deferred to the agency's interpretation and found that EPA's withholding of funds was neither illegal nor an abuse of discretion (*id.* at 12a-13a, 25a). The court also held that the agency's actions did not constitute an unconstitutional abrogation of Milltown's contract with New Brunswick. The court found that the withholding of funds from MCUA because of Milltown's failure to adopt a user charge system, while perhaps making the impairment of Milltown's contract "a more attractive alternative," did not itself require the impairment of the contract, and hence the constitutional challenge was without foundation (*id.* at 26a-28a).

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[5] The district court had rejected EPA's request that it order Milltown either to pay user charges or to cease sending its sewage to the MCUA facility (Pet. App. 50a), but EPA did not appeal that decision.

ARGUMENT

Both petitioners contend (82-662 Pet. 8-19; 82-703 Pet. 4-20) that the court of appeals erred in upholding EPA's action as consistent with both the language of Section 204(b)(1) and the purposes of Title II and the user charge requirement. They raise various objections to EPA's interpretation, which are all without merit. The decision below, on which we rely, is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, review by this Court is unwarranted.

1. EPA's interpretation clearly comports with the language of Section 204(b)(1). Petitioner Milltown urges (82-703 Pet. 7) that it is not a "recipient" of waste treatment services because it "receives nothing *from MCUA*." As the court of appeals explained, however, it is undisputed that Milltown's sewage is in fact treated at the MCUA plant, and hence it is quite reasonable to consider Milltown a "recipient" of MCUA's treatment services (see Pet. App. 13a).

Petitioners contend (82-662 Pet. 15-17; 82-703 Pet. 8-9) that Milltown cannot be within MCUA's "jurisdiction" within the meaning of the statute, because that term implies a legal power to act, and MCUA has no such power over Milltown. The court of appeals correctly found, however, that EPA's interpretation of "jurisdiction" to mean the territory served by the sewage treatment plant was "certainly a plausible one" (Pet. App. 14a-15a). Thus, even if petitioners' interpretation of the statute were considered reasonable, the court of appeals correctly rejected it in the face of EPA's equally reasonable interpretation, particularly since Section 204(b)(1) specifically speaks of an "applicant's jurisdiction, *as determined by the Administrator*" (emphasis added).

See, e.g., *Train* v. *NRDC*, 421 U.S. 60, 75 (1975); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Chrysler Corp.* v. *EPA*, 631 F.2d 865, 884 (D.C. Cir.), cert. denied, 449 U.S. 1021 (1980).*

2. EPA's interpretation is also consistent with the purposes of Title II and the user charge requirement. MCUA contends (82-662 Pet. 8-9) that, because EPA's interpretation results in depriving MCUA of federal funds, it is contrary to the general purpose of Section 101(a)(4), 33 U.S.C. 1251(a)(4), of providing financial assistance to construct publicly-owned treatment works. But, as the court of appeals recognized (Pet. App. 19a), this general policy is limited by the conditions imposed by the statute on the receipt of funds, including the user charge requirement. Obviously, the purposes of the statute are frustrated if full funding is provided to a system that does not meet these mandatory conditions, even if there is a need for the funding.

Petitioners also contend (82-662 Pet. 10-11; 82-703 Pet. 12-14) that EPA's interpretation is contrary to Congress' intention that an applicant be allowed "flexibility in the design of a system of user charges that meets the unique requirements of his own jurisdiction." S. Rep. No. 92-414, 92d Cong., 1st Sess. 28 (1971). This statement, however, evinces Congress'

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* There is no merit to Milltown's contention (82-703 Pet. 19-20) that no deference is due EPA's interpretation because its "technical expertise" is not involved. Deference is due an agency's interpretation of the statute it administers, whether or not the question concerns a technical matter. By the same token, it is clear that EPA has jurisdiction under Section 204(b)(1) to withhold grant funds, so Milltown's contention (82-703 Pet. 19-20) that no deference is due EPA's interpretation because it seeks to extend EPA's statutory jurisdiction rests on a faulty premise.

intent only that there be flexibility in the *design* of a user charge system; it does not suggest any relaxation of the underlying requirement that each user pay its proportionate share of treatment costs through user charges. Thus, the court of appeals correctly concluded that Congress' flexibility policy does not extend "to the very question of whether a particular recipient of treatment services will adopt a user charge system in the first place" (Pet. App. 22a; footnote omitted), and hence EPA's interpretation fully comports with Congress' intent.

By the same token, contrary to petitioners' assertions (82-662 Pet. 14; 82-703 Pet. 17-18), this decision does not conflict with the recent Ninth Circuit decision in *Hotel Employers Association* v. *Gorsuch*, 669 F.2d 1305 (1982). In that case, the court upheld EPA's approval of a particular user charge system, emphasizing that Congress intended municipalities to have flexibility in fashioning an appropriate user charge system. That decision did not hold that the "flexibility policy" could be used to exempt certain users from the user charge requirement altogether. As stated by the court below (Pet. App. 23a n.17), "*Hotel Employers* stands for the proposition that the courts will defer to the EPA's exercise of the flexibility that it undoubtedly has in administering the Clean Water Act grants, and will not substitute their own judgment for the EPA's." Clearly, the decision below is entirely consistent with *Hotel Employers*.

Petitioners also contend (82-662 Pet. 14; 82-703 Pet. 11-14) that EPA's action here will not further the "financial stability" purpose of the user charge requirement. One purpose of the user charge requirement is to assure that municipal treatment facilities will be financially self-sufficient so that they

can continue to treat wastes in compliance with the Act. Contrary to petitioners, however, this purpose would not be served by allowing New Brunswick to pay Milltown's share of treatment costs and thus bear a disproportionate burden. As recognized by the court of appeals (Pet. App. 24a), should New Brunswick be unable to continue to pay such a disproportionate share, the MCUA would be left with precisely the kind of revenue shortfall that Section 204(b)(1) was designed to avoid. Indeed, the language of Section 204(b)(1) itself plainly rejects petitioners' argument in that it expressly requires that each user pay its "proportionate share." Under no circumstances can it be contended that Milltown is paying its "proportionate share" for treatment services since it pays nothing at all.

Nor is there any merit to petitioners' contention (82-662 Pet. 11-14; 82-703 Pet. 14-16) that the courts below wrongly relied on Congress' intent that user charge systems provide an incentive for water conservation. While the legislative history of the 1972 Amendments to the Clean Water Act, when Section 204(b)(1) was first enacted, does not explicitly address water conservation, the court of appeals correctly found that "water conservation is an obvious if unstated goal of the 1972 Act" (Pet. App. 24a n.19). See 54 Comp. Gen. 1, 5 (1974) (holding that Section 204(b)(1) did not permit user charge systems based on ad valorem taxes because such a system would not advance the goal of water conservation served by user charges). Moreover, the repeated references to water conservation in the legislative history of the 1977 Amendments clearly acknowledge the water conservation goals already implicit in Section 204(b)(1). See S. Rep. No. 95-370, 95th Cong., 1st Sess. 27 (1977), *reprinted in* A Leg-

islative History of the Clean Water Act of 1977, 95th Cong., 2d Sess. 660 (Comm. Print 1978) (hereinafter "1977 Leg. Hist."); *id.* at 439, 1360.[7]

In sum, EPA's statutory interpretation that Section 204(b)(1) does not permit it fully to fund a waste treatment system like MCUA in which each recipient does not pay user charges is a reasonable one that was correctly upheld by the court of appeals. *Udall* v. *Tallman, supra; Chrysler Corp.* v. *EPA, supra.* Similarly, contrary to MCUA's contention (82-662 Pet. 19-21), EPA did not abuse its discretion in finding that Milltown's failure to pay for sewage treatment made MCUA ineligible for further funding. As the court of appeals held (Pet. App. 20a-21a), the determination whether Milltown's failure was "inconsequential" was primarily a matter for EPA and there is no basis for overturning it as arbitrary and capricious.[8]

3. Although it concedes that this argument "is not a proper basis for certiorari in its own right," Mill-

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[7] Petitioners' contention (82-662 Pet. 13-14; 82-703 Pet. 16) that Congress abandoned any water conservation goal when it sanctioned user charge systems based on ad valorem taxes in 1977 is belied by this legislative history, which stressed water conservation. See Pet. App. 25a. Indeed, in 1977 Congress furthered the water conservation objective by requiring that, where user charge systems are based on something other than metering, users are to be notified of the portion of their bill attributable to the cost of water treatment. Section 204(b)(4)(B), 33 U.S.C. (Supp. V) 1284(b)(4)(B); see also 1977 Leg. Hist. at 439.

[8] Relying on *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 17 (1981), Milltown argues (82-703 Pet. 5-7) that the user charge condition of the grant does not apply to it because it never "voluntarily and knowingly accept[ed]" the terms of the "'contract.'" This argument is specious. Milltown is not the grant recipient, and the grant condition does not require it to do anything; hence, *Pennhurst* has no relevance to the situation here.

town also argues (82-703 Pet. 20) that EPA's interpretation of the statute should be rejected because it raises a constitutional problem concerning the abrogation of Milltown's contract with New Brunswick. This argument is wholly without merit. Milltown completely ignores the court of appeals' explanation that the statute as interpreted by EPA in no way abrogates Milltown's contract (Pet. App. 26a-28a). EPA has simply concluded that MCUA has not met the requirements of Section 204(b)(1), and thus is not entitled to certain federal funds, because of Milltown's failure to adopt a user charge system. The contract may remain in force or it may be abrogated voluntarily by the parties in order to permit MCUA as presently constituted to receive full federal funding, but the statute itself does not impair the contract. Hence, EPA's interpretation raises no constitutional question at all.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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and by separate petition

MIDDLESEX COUNTY UTILITIES AUTHORITY,
Petitioner,

v.

CITY OF NEW BRUNSWICK, and THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER BOROUGH OF MILLTOWN IN OPPOSITION TO THE BRIEFS OF RESPONDENTS

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NOS. 82-662 and 82-703

IN THE

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OCTOBER TERM, 1982

BOROUGH OF MILLTOWN,

Petitioner,

and by separate petition

MIDDLESEX COUNTY UTILITIES AUTHORITY,

Petitioner,

v.

CITY OF NEW BRUNSWICK, and THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF OF PETITIONER BOROUGH OF MILLTOWN IN OPPOSITION TO THE BRIEFS OF RESPONDENTS

In general, the petitions for certiorari filed by the Borough of Milltown ("Milltown") and the Middlesex County Utilities Authority ("MCUA"), and the briefs in

opposition submitted by the City of New Brunswick ("New Brunswick") and by the Solicitor General on behalf of the Environmental Protection Agency ("EPA"), tightly draw the significant issues presented by this case. A short reply is necessary, however.

1. This case arises from the District Court's partial grant and partial denial of cross-motions for summary judgment. Facts were not developed and state court issues were remanded. This may explain some distortion in the opposition briefs. For example, EPA's statement that Milltown "pays nothing at all" (page 10)is true only to the extent that Milltown pays nothing to MCUA with which it has no contract. In fact, there has been and is substantial consideration for New Brunswick's contractual obligation to "take charge and dispose of" Milltown's sewage and, on top of that consideration, Milltown expends substantial funds to collect and pump its sewage to New Brunswick. Nor is EPA correct in saying (page 2, n. 2) that there is no time limitation to the contract. That the agreement is limited, rather than perpetual, was exactly what was adjudicated in *New Brunswick* v. *Milltown*, 3 N.J. Super. 113, 65 A.2d 621 (App. Div. 1949). Nor, finally, can we agree with New Brunswick's claim that "it is not disputed that Milltown is located in the MCUA district area" (page 3, n. 2). Many other Middlesex County municipalities neither contracted with MCUA for sewage disposal nor adopted a resolution pursuant to N.J.S.A. 40:14A-4(g). When MCUA was established in 1950, Milltown had just had its contract with New Brunswick sustained, *New Brunswick* v. *Milltown, supra,* and could rely upon the non-impairment language of N.J.S.A. 40:14A-36 and 40:14B-68. This Court should not get bogged down in local legal questions and factual details that are not presented and need not be considered.

2. EPA asserts that agency deference does not depend upon technical isues and technical expertise (page 8, n. 6). But saying so does not make it so. Expertise has always been the major ground for deference, and EPA gives no reason for its assertion to the contrary. Indeed, EPA twice cites (pages 8 and 11) *Chrysler Corp.* v. *EPA*, 631 F. 2d 865 (D.C. Cir.), *cert. den.*, 449 U.S. 1021 (1980), which involved an extremely technical record, 631 F.2d at 869-878, and deference to the agency's "special expertise". *Id.* at 884. Milltown submits that none of the precedents relied upon by EPA (pages 8 and 11) and by New Brunswick (pages 5-6) are apposite because none involve the circumstances here: a question of *legal* competence, not *technical* expertise, and an issue of the agency's own statutory jurisdiction. The matter of agency deference should be considered and resolved once and for all. See page 22, ¶5 of Milltown's petition.

3. Finally, there is EPA's submission that the contract impairment issue is "wholly without merit" (page 12) and the *Pennhurst* point is "specious" (page 11, n. 8) because EPA has not harmed the Borough of Milltown: because EPA's statutory construction "in no way abrogates Milltown's contract" (page 12—paraphrasing the court below), and because "the [EPA's] grant condition does not require [Milltown] to do anything" (page 11, n. 8).

Words replace reality in the no-harm assumption EPA would foist upon this Court. As a December 27, 1982, EPA document (a joint exhibit in the remanded state court trial of this matter) makes clear, EPA is using MCUA as its pawn. The document (from EPA regional headquarters to its national office)* recommends release of grant funds to MCUA if, *e.g.*, MCUA submits "written

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* Appended to this brief.

evidence that the Borough of Milltown case is still being vigorously prosecuted." And the result of this coercive tactic is equally clear. Here is what MCUA wrote in a supplemental trial brief in the state court action (filed January 3, 1983) (p. 8):

> "What MCUA can do, and is doing, in this case is to seek to alter the legal relations between the parties [Milltown and New Brunswick]. It is attempting to establish a legal basis to compel Milltown to adopt an EPA approved sewer user charge ordinance and to impose sewer use charges."

The reality is raw: EPA was judicially denied the right to impose its user charge regulations on Milltown. (EPA brief at page 6, n. 5). Instead of appealing, EPA pressured MCUA to seek abrogation of the Milltown contract and imposition of the user charge system. MCUA, more interested in its grant than in its own enabling legislation,* has been performing the role created for it by EPA. In short, EPA's statutory construction does impair and is being used to abrogate the Milltown/New Brunswick contract; and the grant condition is likewise being used to require Milltown to do something it is not legally obligated to do. This Court should deal with fact, not legal fiction, and remedy EPA's overreaching here.

Respectfully submitted,

CLAPP & EISENBERG,
A Professional Corporation,
Attorneys for Petitioner
Borough of Milltown,
By: ARNOLD K. MYTELKA,
Attorney of Record.

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*The enabling legislation precludes impairment of pre-existing intermunicipal contracts. N.J.S.A. 40:14A-36; 40:14B-68.

SUPPLEMENTAL APPENDIX

U.S. ENVIRONMENTAL PROTECTION AGENCY
Region II
26 Federal Plaza
New York, New York 10278

December 27, 1982

Request for a Deviation From 40 CFR 35.935-13(a)
for the Middlesex County Utilities Authority

Jacqueline E. Schafer /s/ JACQUELINE E. SCHAFER
Regional Administrator (2RA)

Harvey G. Pippen, Director
Grants Adminstration Division (PM-216)

This is in response to the memorandum of November 23, 1982 from James R. Murphy to William J. Muszynski (copy attached), concerning implementation of a user charge system in Sayreville, New Jersey. This memorandum is the formal deviation request from the above-referenced regulations on behalf of the Grantee, Middlesex County Utilities Authority (MCUA).

The MCUA has submitted an acceptable user charge system and has submitted acceptable systems for all 26 members with the exception of the Borough of Milltown and the Borough of Sayreville.

The Borough of Milltown utilizes the system of the City of New Brunswick, a member of the MCUA. The City of New Brunswick has submitted an acceptable user charge

system and has initiated legal action against the Borough of Milltown to have the court order the Borough to adopt an acceptable user charge system. The City has agreed to vigorously prosecute its pending lawsuit against Milltown and has committed itself to undertake all other possible actions that may be necessary to ensure that Milltown complies with this Agency's user charge requirements. The MCUA has filed a cross claim in that suit against Milltown in which it joined in New Brunswick's request.

The MCUA has instituted court action to compel the Borough of Sayreville to also comply with EPA's user charge requirement. The Murphy memorandum has indicated that neither the existing tax structure in Sayreville nor the ad valorem system proposed for the Borough by the MCUA are approvable. The MCUA has indicated that it would use this decision to seek enforcement of a state court order it has secured against the Borough of Sayreville which requires Sayreville to adopt an approvable system. The state court order does not require Sayreville to enforce the adopted ordinance until the resolution of the state court appeal.

Under these circumstances, it seems an extremely harsh penalty to continue wthholding grant funds from MCUA to the extent of approximately $10 million when it is prosecuting the cases against the two hold-out municipalities. The penalties are large because MCUA has been forced to borrow at high interest rates the amounts withheld in order to meet its commitments. The costs are, of course, passed on to the municipalities that are in compliance through increased service charges and are in turn billed to the local users and are not eligible for Federal funding.

Supplemental Appendix

Recommendation:

Based on the above-information, I am requesting a favorable decision on the deviation request to allow the MCUA to receive payment beyond the 82% current restriction for user charge compliance and up to the 95% level. The MCUA has demonstrated that they have taken legal means to force the communities, in question, to comply with this Agency's user charge requirements. Therefore, it would be unfair to further restrict grant monies from the MCUA since they have complied with our requirements as far as they are able. However, as required in the Murphy memorandum, the following schedule for payment will be utilized:

1. Release up to 90% upon receipt of a favorable response on this deviation request. This is based upon the MCUA's demonstration of meaningful progress towards resolution of the user charge non-compliance from early 1980 when the Region first withheld payment and the assumption that MCUA will immediately seek to compel Sayreville to comply with the state court order which requires Sayreville, immediately, to adopt (but not enforce) an acceptable ordinance. A summary of the progress is attached.

2. Release up to 92% pending receipt of an acceptable draft user charge system from the Borough of Sayreville. In addition, written evidence that the Borough of Milltown case is still being vigorously prosecuted.

3. Release up to 95% upon final approval of the user charge system for the Borough of Sayreville. This final approval will only be given when Sayreville ac-

tually begins to enforce an acceptable, adopted system. Also, continued evidence that the Borough of Milltown case is being pursued through all legal means.

Your concurrence with this request would be appreciated. Should you have any further questions, please contact Mr. Douglas Herbst of my staff at 8-264-5670.

Attachments

Supplemental Appendix

SUMMARY OF MCUA's ACTIONS TOWARDS USER CHARGE COMPLIANCE

Milltown

In August 1980, New Brunswick instituted an action in the Superior Court of New Jersey against both MCUA and Milltown. It sought an order declaring the 1914 contract between New Brunswick and Milltown, giving Milltown a free ride on the disposal of its sewage, void and unenforceable because of EPA's intervening regulations requiring the adoption of an acceptable UCS and SUO by each municipality whose sewage was treated by a regional system.

MCUA, claiming that it had no authority to abrogate the 1914 contract or to impose a UCS or SUO against Milltown impleaded EPA as a third-party defendant.

EPA removed the action to the Federal District Court for the District of New Jersey and moved for summary judgment which was granted on September 9, 1981. The court held that EPA's regulations were valid and that its withholding of grant funds from MCUA because of Milltown's refusal to adopt acceptable sewer charges was not an unconstitutional abrogation of the 1914 contract. It remanded the case to the New Jersey Superior Court to decide whether Milltown should be ordered to adopt acceptable user charges.

Milltown appealed the District Court order to the Federal Third Circuit Court of Appeals which affirmed the judgment of the lower court in a decision dated July 22, 1982. Milltown has applied for a writ of certiorori to the United States Supreme Court.

Supplemental Appendix

On the remand to the Superior Court of the issue concerning the 1914 contract, MCUA has aligned itself with New Brunswick in an effort to void that contract and to impose on Milltown the requirement that it adopt acceptable user charges. A trial is presently scheduled for January, 1983. If Milltown loses, it probably will appeal to the Appellate Division and will try to take any loss there to the New Jersey Supreme Court.

Sayreville

On February 1, 1981, MCUA instituted an action in the New Jersey Superior Court seeking to compel Sayreville to adopt a UCS and a SUO. Sayreville impleaded EPA as a third-party defendant which had the action removed to the Federal District Court for the District of New Jersey. EPA moved for summary judgment which was granted on December 1, 1981, the court holding that EPA's regulations requiring municipalities subscribing to regional systems to enact acceptable user charges was valid.

The court declined to rule on MCUA's motion to compel Sayreville to comply with EPA's regulations and remanded that issue to the New Jersey Superior Court for determination.

Sayreville appealed to the Federal Third Circuit Court of Apeels the order against it in favor of EPA. The appeal was denied.

Meanwhile, on remand of the MCUA—Sayreville issued [sic] to the New Jersey Superior Court, MCUA moved for summary judgment requiring Sayreville to adopt a UCS and SUO. On February 3, 1982 the court granted MCUA's motion and directed Sayreville to enact a UCS and a SUO

by April 7, 1982. On that date, Sayreville did introduce an ordinance on first reading for the imposition of user charges. A public hearing was held on April 21, 1982 at the conclusion of which the proposed ordinance was tabled.

Prior to the public hearing Sayreville appealed the February 3, 1982 Superior Court order against it to the New Jersey Appellate Division on March 16, 1982. Briefs have been filed by both parties but the court has not yet scheduled a time for oral argument. The MCUA has requested that the appeal be heard on an expedited basis. Meanwhile, the Apellate Division has refused to stay the trial court order requiring Sayreville to adopt an acceptable ordinance although it did stay that portion of the order requiring Sayreville to enforce the ordinance pending appeal. The MCUA has indicated that it will immediately seek to compel Sayreville to comply with the court order, i.e., to adopt an acceptable ordinance. Whoever loses in the Appellate Division will undoubtedly appeal to the New Jersey Supreme Court.

Supplemental Appendix

Middlesex County Utilities Authority
Project Number C-34-637-01

Grant Amount	$ 78,844,421
Total Eligible Amount	$105,125,895

According to the October 15, 1982 letter from grantee's consulting engineer to grantee's counsel, the following cost data was supplied:

Paid to date	$65,314,910
%	82.8%
Value of grant eligible work as of August 26, 1982	$104,369,656
Final eligible project costs are expected to be	$106-107 million

Given the above-information, it is evidence that by releasing further payments to MCUA to the 92-95% range, the Region will have the remaining monies available to use as withholding pending compliance. This is borne out by the fact that the final total eligible project costs will be more than the existing amount contained in the grant. The grant would require a future increase to account for these increased eligible costs.

Therefore, the Region need not be concerned that by releasing further payments, the MCUA would in effect receive more than 92-95% of their final grant entitlement. This would be the case if the final total eligible project costs would be less than the existing amount contained in the grant.

Supplemental Appendix

[SEAL]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

November 23, 1982

OFFICE OF WATER

MEMORANDUM

SUBJECT:

Middlesex County Utilities Authority—Borough of Sayreville User Charges

FROM:

James R. Murphy, Acting Director /s/ DAVID LUOMA
Municipal Construction Division (WH-547)

To:

William J. Muszynski, Acting Director
Water Management Division, Region II

This is in response to your memorandum of September 22, 1982, to Henry Longest, concerning implementation of a user charge system in Sayreville, New Jersey. This response confirms the discussion that Dave Luoma held with you on November 12, 1982, in which the following points were made.

First, it is the opinion of the Office of General Counsel (OGC) that neither the existing tax structure in Sayreville nor the ad valorem system proposed for the Borough

by the Middlesex County Utilities Authority (MCUA) are approvable. This opinion, dated November 5, 1982, (copy attached) has a statutory basis and we concur with it.

Next, we would encourage you to continue to work with the grantee, MCUA, toward meeting its grant condition of having actual user charge systems implemented in Sayreville and in another serviced community of Milltown. You should do this as far as is prudent and reasonable, while adequately protecting the Federal interest. At your option, we would support a plan for incremental release of further grant payments in return for the grantee clearly demonstrating meaningful progress toward resolving the Sayreville and Milltown user charge problems. If you intend to proceed with such a plan, we would further recommend that a cap of 90%-95% of the grant amount be established until all MCUA—related user charge systems are approved and adopted.

You are, of course, aware of the need for a request for a deviation from user charge regulations if you decide to release further grant payments before all user charge systems are approved and adopted. Therefore, we would also recommend that such a request include a discussion of the terms under which incremental payments would be released and an indication of the level of the cap on grant payments.

Attachment

cc: Sol Seid